Donald: I appreciate you all coming. Today's session will perhaps be a little different than some of them that you have attended. Unfortunately, I will be using PowerPoint, so that puts it in line with other sessions you have attended. But I'm hoping to focus in on a number of laws today that most of you have to deal with, and hopefully give you a slightly different understanding of those laws. In my practice, I constantly deal with legal departments and lawyers and releases of new laws and legal research. And I occasionally go online and read some of the articles that have been written about these provisions. I am generally horrified by what's being written by attorneys who know absolutely nothing about the records management issues in these laws. And I'm sure you encounter the same sort of problem.

Just because somebody is an attorney doesn't mean they know anything about laws affecting records management. In fact, there are many of you in this room who know a whole lot more. Just so you know where I'm coming from, besides being a lawyer and licensed in Colorado, I went to law school. We didn't spend one minute of three years discussing records management issues, records retention, legal requirements for electronic imaging, well, it didn't exist at that time, legal requirements for microfilm, at that time. Oh, some of you do remember microfilm.

I'm going to come to a slide and we'll see if you remember the topic of that slide, and then it'll really show you your age, if you do. I'm hoping that we can talk about some additional skills, and the learning objectives that I presented for ARMA are in the handouts. ARMA said that you can access all the handouts online, so we will assume that's the case.

I have selected a few laws. There could be many more, but I tried to pick a couple that were basically things that most people had to deal with. There's Dodd Frank and Gramm-Leach-Bliley and things you may have heard about, but that's a more limited audience, and I'd elected to avoid those.

What are some of the key laws I want to look at? Oldie but goodie, these are not new laws. What I've elected to do is it to take these laws, look at the current understanding, and then re-approach them with you as to what they really say. And make suggestions in my opinion, how you should implement it in your organization. Sarbanes-Oxley, an oldie but goodie. Not so old but a goodie is the Lilly Ledbetter Fair Pay Act, that many of you have to deal with. ERISA, the Employment Retirement Income Security Act. I apologize for using the abbreviation, but we spell it out in a later slide. And the Uniform Electronic Transaction Act. There's such misconceptions as to what you can or cannot do.

If time permits, I'd like to talk about my current favorite subject, which is federal preemption. If you don't know what that is, that may be okay, because we may not get to it. But only if time permits, I will deal with it. Okay, Sarbanes-Oxley Act of 2002, some of you may know that I am blessed with triplets. Some of you may have been in this session 24 years ago, when they were born. Some of you even got to meet them in Denver, when the national conference was in Denver. For a while there, when I put my kids to bed, we would thank everybody for the wonderful day and everything, and I would add, "Thank you, Mr. Sarbanes, and thank you, Mr. Oxley for everything we have," because the mass hysteria that resulted from Sarbanes-Oxley has actually contributed to a major part of our business.

What happened? I'm going to have to get into a little bit of politics, you may get where I stand, politically. That's not my goal. My goal is to explain what led to this, what it means, and how to think about it and implement it. In the late 1990s to 2000, some of you may remember during the Clinton Administration, we had a major increase in the stock market. Many of these were valueless stocks. The dot-com would come on the marketplace, people would buy it up, it'd be totally worthless, and the stock market would go up. You couldn't make a bad investment decision. All stocks went up all the time. And of course, the administration, at that time, bragged about how great the economy was, as a result of all of this.

Well, many of these companies creatively fabricated their financial statements. That is saying it nicely. They committed fraud, and they got away with it. Thus, the value of their companies appeared much greater than they really were. Certified public accountants, who were supposed to protect us, participated in this audit deception.

Examples of companies that were involved during this period, some of you, looking at the audience, were a little too young to remember all of this, but Enron, Tyco, and Andersen--I'm going to focus a little bit on Enron and Andersen, Arthur Andersen, and what transpired with them. They were selected to be the CPA, Certified Public Accountants for Enron, and thus they were doing the audit. But they had a $3 million audit contract with Enron, and a $75 million consulting contract. Do you think they were nice during the audit, in order to keep the other business relationship? That was a problem.

The other reflected thus an overly positive view of the financial situation for Enron. Enron's stock rose artificially, and it was valued higher than it was in reality. This is just some background information, what led to the law and thus, what the legislators were trying to resolve, as part of it. Arthur Andersen, by the way, had a reasonable retention schedule, identified records that could be destroyed after six years, had retention of essential information to support the audits that they were involved in. They had a retention schedule, like many of you do. They permitted destruction of drafts and notes and all non-vital documents well before the end of the retention period, and they said, "No destruction if litigation was threatened."

Well, they were wrong. Litigation was threatened, and the federal government was investigating not just Enron, but Arthur Andersen. So, Arthur Andersen was under investigation for the Enron audit, and Andersen lawyers reminded Andersen employees to destroy records under the retention schedule. Now, I'm sure you all know that even if you have a retention schedule, when litigation is in progress or imminent, you may not destroy relevant records. Well, Andersen did destroy records, but they destroyed it under the retention schedule. And so please be aware, from their experience, that the retention schedule will not protect you during litigation, government investigation, and audit. You may not destroy relevant records during those periods.

This made the investigation of this financial fraud much more difficult for the Department of Justice. Therefore, Congress, in 2002, came up with Sarbanes-Oxley Act, named after two representatives from both sides of the house, a Democrat and a Republican. President Bush came into office around this time and selected a new director of the Security Exchange Commission. It did not take that director more than six months to uncover this entire fraud.

And it wasn't just Enron, it wasn't just Andersen, it was all these dot-coms. Most major corporations were lying through their teeth. They were making up numbers. The stock market went up. The goal of the 2002 law was to improve the accuracy of the financial reporting. So when people ask you why do we do all this stuff under Sarbanes-Oxley, please remember the history.

Huge fraud involved deception. Individuals/organizations bought stock, based upon false premises. The goal was to get accurate financial reporting, and to restore confidence in the stock market. When you look at the financial performance of an organization, it is correct and you can base your investment decisions on that.

What are the key provisions? This now gets into the recordkeeping part. A new organization was created. The public company accounting oversight board, most people refer to them as "peek-a-boo." They had "oo" at the end, you know, to PCAOB, Peek-a-boo. Up to this point, certified public accountants were not regulated, so they were hired to review the finances of public companies and rule on the accuracy, but nobody regulated the CPAs. The purpose of this new federal corporation was to oversee them, and set guidelines and rules to make sure they were doing their job.

They established a federal oversight of the public accountants. So if you're a public accountant firm, this is the first area where the regulation affects you. You now have all sorts of reporting, all sorts of other requirements you need to follow. The law also required the CEO and the CFO, Chief Financial Officer, to personally certify the accuracy of the financial statements. So now we had to have the financial statements signed by not just the CEO and the CFO, and of course those records need to be kept. This is what the press picked up on, as the most important thing in Sarbanes-Oxley. It's just a minor thing in the process.

Penalties, and the penalties made all the difference. There was a provision in there for a penalty of up to 20 years in prison for anybody knowingly altering, destroying, mutilating, concealing, covering up, or making false entry in any record with the intent to interfere with any government investigation or proper administration of any law. Therefore, if you have to file not just a financial statement, but any record with the federal government or state government--in this case, it would only apply to federal records--that if somebody's manipulating the information, creating false information, et cetera, deliberately to deceive—they can go to jail for 20 years. Now, pre or prior to this, there was a statute on the books, but it related to the corporation. The corporation who submits false information can be fined and penalized. But no person would go to jail.

Now they're saying people will go to jail for making improper records. This got the attention of the boards of directors, because if the boards of directors approved the financial statements, and they were false, there was a threat—it never happened but there was a threat that they individually could go to jail. All of a sudden, some of you may have been around at that time, in 2002. There was a renewed interest in records management and especially records retention, because the boards of directors then insisted that the legal departments review and confirm that the retention programs in their organizations comply with this legal standard. Thank you, Mr. Sarbanes, and thank you, Mr. Oxley.

What's the record keeping provisions that you have to implement? Again, if you're the public auditors, you have to confirm the accuracy of the corporate financial statements, and you have to keep records of audits for seven years, and the audit work papers. Many of you have heard this seven before. If you've heard me speak before, if you've read my books, et cetera, you know seven years is a myth for tax records, for example. There is no seven year requirement for tax records. But for some reason, when this provision was approved, it was adopted with the seven year provision to go along, I guess, with the rumor. That's the best I can figure out.

Notice the seven years does not apply to the corporation. It applies to the public auditors. What does the corporation have to do? The corporation has to maintain audit and accounting complaints. If somebody complains about your system (a whistleblower) you've got to keep records. Years ago, there was a more explicit reference, related to retention about keeping the records, and we interpreted this as the type of law you shall keep records. But no retention period is stated, so we generally interpreted that as three years.

Yet, in the last few years, this was watered down as just a duty of the corporation. It was downgraded, in terms of its importance. I'm not sure if there's any particular retention you have to be concerned about. You have to manage the outside auditors, because you've got to hire them and make sure they're doing their job.

And then the big section, 404 compliance for the annual audit. What does all this mean? You have duties to establish internal accounting controls for your accounting system, and demonstrate those controls work. Anybody deal with 404 compliance? It's a huge amount of record keeping. You have to show that every part of your financial record keeping system has procedures that people working on those systems are trained and know what they're supposed to do, and each of those little components of the system work.

Intake of bills to be paid works. Processing of those bills works. Entry into the computer works. If any of you have studied ISO 9000 standards on quality assurance, this is the same thing. It's quality assurance for financial record keeping. The auditors confirm the accuracy of the final financial statement. You develop the controls and the records that show every step of the process works. You then give that data, that information, to the public auditor, and the public auditor now rules on two things; the accuracy of the financial statement, the accuracy of the system. If any of you have read other publications of mine, related to how you make a legal system, part of the definition is you need three things: procedures, training, and audit.

Procedures tell you what you're supposed to do in the Sarbanes-Oxley mode. It'll tell you what should be happening. Training, if people know what they're supposed to do, there's a high likelihood they will do it. And audit confirms that things did, in fact, happen the way they were supposed to. The public auditors confirm the accuracy of the financial system and reporting, through traditional audits, review the corporate controls. By the way, you'd be surprised that, except for the public auditors, the corporation has no long term retention requirement under Securities and Exchange Commission.

I've paraphrased what 404 says. There is no long term retention requirement in Sarbanes-Oxley for the corporation. What do most of you do? Most of you will keep the record seven years, or permanent, et cetera. Please go online. Google Sarbanes-Oxley. Read the law. It's a miserable, boring law. If your kids cannot go to sleep at night, read them Sarbanes-Oxley, or read them one of my books. That'll accomplish the same thing.

The reality is, it does not establish any long term records retention requirements for the corporation. During the year, you review all these systems, you document the controls. At the end of the year, you give it to the auditor. You're done. I have had this discussion with so many financial people and corporations. They all agree with the interpretation. On the other hand, very few of them will do what I just described, throw the records out the next year. That's a different problem.

But the first part of the issue is a recognition of what's the legal requirement, and there is none, other than keep it for the current year and give it to the auditor, and then you're basically done. SEC, by the way, does not then come in and do the same type of review the public auditor does. They may do other things, but not the same type of auditor review, so you don't have to be worried about them. That's pretty much Sarbanes-Oxley. Questions? Anybody have a question or comment? Yes, real loud.

Female: If you're a privately held company, and you have public financing, how secure is, I mean, I run into this, where they say, "Oh, now we're privately held, but now we've still got these records, because we have public financing," [inaudible 00:22:37].

Donald: If you're privately held with some public financing, like bonds or things like that, do you still have to follow the provisions of Sarbanes-Oxley? Number one, a privately held corporation does not have to follow Sarbanes-Oxley. Would you want to do the quality insurance-types of things? Probably a really good idea. I have seen a lot of privately held companies make decisions to... actually, I saw one that got certified by ISO 9000, even though it's a manufacturing quality assurance standard, because they wanted to show they have good processes in their organization.

Then, if you want people to feel good, when you float a public bond in the public, that when you provide financial information, it is accurate and they can rely on it and they can trust you. I think it's a good idea, but I don't think you have to. I think it's a good idea, but it's not a requirement. Okay? I'll take one more, and then I'll go on to the next one. Yes?

Female: I don't mean to sound dumb, but I'm part of a law firm that deals mainly in litigation in estate planning matters. How does Sarbanes-Oxley relate to us?

Donald: It probably does not. You're privately held, and therefore, you do not have to follow Sarbanes-Oxley, but you're going to advise your clients about that a whole lot. It's important for the law firm to fully understand it. But again, I'll go back to the previous comment. Quality assurance for financial records is a real good idea.

Female: No, but [inaudible 00:24:22].

Donald: Yes, but to do it very formally is better.

Female: [inaudible 00:24:29] records.

Donald: Okay, good. Let's go on, and if I don't get your question, I'll be glad to take them after, and I'll be around during the conference. Okay, as I said, most misunderstand the basics of Sarbanes-Oxley.

This is a fun one. Who is this? She's one of the only non-politicians, like Sarbanes and Oxley, who has a law named after her. Lilly Ledbetter, and the law has created controversy. After Lilly Ledbetter came out, I had no idea the law came out. I had gotten a number of requests, and then I had to start researching, and I found one article after another by attorneys, saying, "You now have to keep all your payroll records forever." That was the response, and by the way, we still hear it. Lilly Ledbetter Act came out in 2009. What happened with poor old Lilly?

She was employed by Goodyear Tire and Rubber. They apparently weren't paying her enough. They were discriminating against her, as the Supreme Court in 2007 determined that there was pay discrimination going back several years. The Civil Rights Act allows a 180 day statute of limitation to resolve discrimination or to begin a lawsuit for a discrimination suit. But they discovered, which is correct, that going back 180 days would not resolve the problem of this pay discrimination that had been going on for years. It would resolve it from 180 days ago, up to the present, but not the historical discrimination. The Ledbetter act says each paycheck for which there was discrimination can be reviewed. If there was discrimination 20 years ago, that paycheck can be reviewed.

The plaintiffs could go back an unlimited number of years. Let's say in 2014, somebody brings a pay discrimination lawsuit. They can go back to the beginning, when the person was first hired, subpoena all the records, examine what this person was paid versus other people comparably situated, and determine what that person should have been paid up to 180 days ago. They can show what the pay should have been, because if they were discriminated, the pay is way lower in 2014 than it should have been. If they had received the right amount, the pay for 2014 would have been at a higher level, and now we can deal with that question.

But the law does not say that you can collect the accumulated loss in the paychecks. All that can be done is you can go back 20 years, 15 years, 10 years, figure out what the pay should have been, determine what the salary should have been as of 180 days ago or whenever the lawsuit was brought, minus 180 days, and then claim recovery for discrimination at that point.

The accumulation of discriminated pay cannot be collected. Lilly Ledbetter does not provide for that. In fact, it says that the Civil Rights Act of the 180 day statute of limitation is still in effect. It establishes a right for the plaintiff, of course, to search back any records that may exist, determine whether there was discrimination in pay. The company has no requirement. There is nothing in Lilly Ledbetter that requires you to do anything different than you have done historically. You don't have to keep more records. It doesn't say. But if you have them, the plaintiff can go back and figure out what the salary should have been in 2014, as opposed to what it really was, and then the claim is made as of 2014.

There are numerous laws establishing retention requirements for payroll. Don't worry, we have plenty of them. If you don't know how long to keep payroll records, I can give you probably 50 of them. They don't all say the same thing, but every state has requirements. Federal government has requirements.

What's the impact of retention on payroll records? Many attorneys claim the companies now must keep their payroll records forever, or indefinite. Why? Because they saw the provision. You could go back and research the historical records, so they all of a sudden thought you have to keep them. The Supreme Court never said that, and the Lilly Ledbetter Act never said that. It's not required in the law. It would be a huge retention in discovery burden. Can you imagine, well, many of you here keep payroll records forever, anyway. You don't have to imagine. You live the nightmare. You don't have to keep your payroll records forever. That never was a requirement. And if you do so, you pay the price for doing so.

We have recommended, for the longest time, six years. By the way, we changed our normal recommendation last year. It used to be eight. Anybody from the great state of Minnesota? Bless your little hearts. Minnesota, several years ago, came up with the only eight year requirement for payroll records in the United States, and they recently changed it to something reasonable, like four. There are some that are a little bit longer, that drives us to six. So six years for payroll records. I can show you the research, if you need. That's the end of that one.

Lilly Ledbetter, it is not what you think it is. Your HR people are probably going berserk over this. Go and Google it also. Read some of those ridiculous articles written by attorneys who all of a sudden say you've got to keep the records forever. If you have no law requiring you to keep the records forever, and you have many laws that say you don't have to keep it longer than six years, is it reasonable to keep the records for six years, even though the plaintiffs would have liked you to keep it forever, so they could search and find the discrimination?

By the way, when we talk about discrimination in salary, they don't look at one person. You can't tell discrimination by the salary of one person. You have to look at many other employees, comparably situated, and see how this one person and what their situation was, and did they fare properly, compared to the others? That meant a whole department, a whole company of records would have to be kept, if you think that's what the law is telling you to do, all your payroll records. I don't believe that's what the law says. That's not what it was intended to do, and it was quite specific that there is no recovery for the historical discrimination. Question on Lilly? Yes?

Female: On the 180 days, is that a seven day week, or is it based upon a work week for an individual?

Donald: You stumped me. I don't know if the 180 days is working days or calendar days. I have absolutely no idea. If you write me after the session, I will give you the answer, but I'm pretty confident it's calendar days, because statutes of limitation are written that do not discriminate on weekends and stuff like that. They talk about six years, and they don't say, "But if it's a leap year, you get six years and one day," or anything like that. A question back there, yes? Real loud.

Female: Is your recommendation of six years based on a trigger of payroll date of six years, or employee termination date?

Donald: The six years. The question was is my six years based upon a payroll or termination? If I was talking about termination, I would have written it active plus six, the active period being while the employee is employed, plus six. Now, I mean absolute six from the time of the payroll, because that is, if you look at how the laws are lined up, they don't require payroll records to be kept for the life of the employee. We're going to get into the more interesting one, which is ERISA, in a second. This is much more controversial, but it deals with the same type of issue. Okay, we're going to move on so we can cover at least the core material that I wanted to in today's session.

Okay, ERISA. Here's the whole name, Employee Retirement Income Security Act. Okay, here's the one. Does anybody know what a Studebaker is? Oh, okay. You're giving yourselves away. In 1963... I just thought a little background on these would be of interest. Otherwise, my presentation would be boring and miserable. Studebaker Corporation closed a plant. I don't even remember where it was. The pension plan was inadequately funded, or illegally misused. There was a lot of money missing in the pension plan, a very common story. This has happened in a lot of situations where companies have closed. It happened with the automobile companies. They were underfunded, there was money missing, they couldn't always explain where it went, but there certainly wasn't enough to pay all their obligations.

Some employees got benefits to which they were entitled, and others of course got little or nothing. Most got nothing, and Congress was brought in to do something about this situation. All these laws come from something. Congress doesn't just sit there and make up... well, I guess they do sometimes, but most of the time, there's a reason for it.

Let me give you one of the more interesting things. It had nothing to do with my presentation. Do you know that there are records retention laws on matches, because somebody got burnt by a match, or injured? There are no records retention, we had to keep the records provision for butane lighters. There are records retention requirements for lawn mowers, but nothing for hedge trimmers. Just as dangerous. It's just because nobody had a problem with a hedge trimmer, or a butane lighter, and that's how we got a lot of laws. It's just there was a problem, Congress went to resolve that problem, and sometimes nothing else, just that limited area.

ERISA came out in 1974. What's this big gap here? In 1963, the company went bankrupt and ERISA came out in '74. They came up with all sorts of provisions during that period. They weren't happy about it, they couldn't pass anything, et cetera. Finally, 1974, they came to an agreement. Employers are not required to have employee benefit plans. They made this clear. We're not telling you, as an employer, you have to have health insurance, a pension plan. You don't have to do any of that. But why would an employer do these things? To entice employees. It became very competitive after a while, that companies that offered better benefit plans were likely to be able to have the pick of employees. Those that didn't offer benefit plans, the employees didn't want to work there.

That's how benefit plans got into the business arena. And I won't say the next part, why healthcare insurance got into the business world, and not in government. It primarily covers pension plans. I mean, that was the main goal, but health plans, health insurance plans are also covered within ERISA. In terms of the pension plan, the couple of requirements many of you are already familiar with, the employees vest in five years, must be adequately funded, and there are reports to employees in the government that are required. Let me ask you a question. Most of you are working for companies. Do you get a report on the status of your pension plan each year? Raise your hand. Okay, is there anybody in the audience who does not? Okay, great. Important point, and we'll get to this.

Then there was the creation of the pension benefit guarantee corporation. Sorry to throw all this at you, but it's important to understand the whole context, because they have a very important regulation. They say that if the coverage of the plan is not sufficient, the assets aren't sufficient to pay the obligations under the plan, the pension benefit guarantee corporation will pay. That's the goal. But in order to make sure they're not paying while the presidents of corporations are stealing from the pension plan, they require the company to keep records to show the plan's sufficiency, that the plan is being implemented and there's money. I guess I didn't include this slide here, but you also have to keep those records for six years. I think I repeated it, in just a second.

There's an absolute requirement for contributions to the benefit plan. So if you pay, the corporation pays an either 401(k) or any other type of plan, how much was paid in, the reports that are given to employees. They have an absolute six year requirement, and I think it's in another slide, too. As I said, ERISA also covers some health insurance. Most of you know HIPAA for another reason, the Health Insurance Portability and Accountability Act of 1996. But the plan is also covered by ERISA, because it's a benefit plan. So the plan must cover pre-existing medical conditions. The plan may not discriminate.

And I'll throw the last set of abbreviations at you, COBRA. I decided not to write it out, because the meaning of COBRA has nothing to do with what the law is supposed to do. Just think of it as COBRA. If you leave your company, you have a right to continue paying for your health insurance, and keep it in effect for a period of time, and that's what basically it does. The employees and beneficiaries continue the coverage after termination.

There are two types of pension plans in the world, and it's important to understand the differences. One's real easy to deal with, the other is real difficult to deal with. The defined benefit plan is the difficult one. This is the old style pension plan. You work for the company for 40 years, you're at this level, you will get X number of dollars for the rest of your life. It doesn't matter if you paid in a penny or not. It's whatever the rules of the game are. This is the old style, okay? We don't know what the person will be paid until they terminate. It depends on years of service, it depends on salary, it depends on level that they've been promoted to, things like that.

The new type of pension plan, which is like the 401(k), is the defined contribution plan. Instead of talking about what the benefits will be at the back end, we'll talk about what you pay in. The company says, "We'll pay two percent of your salary into the 401(k)," an employee can match it up to two percent with their own money, if they want to, or they don't have to, okay? Money is paid into the account. You generally have control to say how it's to be invested. And at the end of the year, when you get your statement, which everybody said they had statements, basically it says, "Here's the value of my account, with the amount of money that's been contributed, with the directions I've given for investment. Here's how it did. I have $100,000 in my account," if you were with the company five years, most have five years vesting before you get the rights to all the money.

If you terminate, you take $100,000 and that's your pension plan. You can convert it to monthly payments, et cetera, but it's what's in the account is what you get. Defined benefit plan is what you were promised is what you get. Totally different worlds. Some advocate to keep the pension records forever to confirm the contributions, the benefits, investments. And in those discussions, most of those people fail to distinguish between the two types of plans. It makes all the difference in the world.

ERISA has a statute of limitations, and I've given you the citation. 29 USC 1113 A1 says six years when, not that you're given notice, no notice. We're not going to tell you what we contributed to your plan. We're not going to tell you whether it was right or wrong or anything like that, no notice. You still must sue us in six years to get the right amount deposited. Therefore, you have an obligation to check. Well, you don't have that problem, because you get your annual statements.

The second provision has a three year statute of limitations, that you could sue your employer for three years, if they put the wrong amount into your account, for example, when the plaintiff had actual knowledge of the breach or violation. How do you have actual knowledge? You've got the statement. The statement told you what they put in. You can have the right to compare it against what they should have put in. By the way, you have some duty to do that, and if you fail to do that, too bad for you. Employees get annual statements. Fraud, by the way, is a different matter, and you can sue your employer six years after you discover the fraud. We're assuming, with all the safeguards in today, fraud isn't going on. It could be, but that's not normally the case. Mistakes are sometimes made, the wrong amount goes into the wrong account.

I forgot to mention something. I didn't make it into a slide. You may or may not know this, but for Social Security purposes, the statute of limitation is three years. Your employer takes money out of your paycheck, pays it into the Social Security system. There's withholding, there's an amount of what your salary was for Social Security computation and things like that, that goes on. If they report that your salary was zero for 2015, through Social Security, you have three years to get that corrected, and the burden and duty is on you. Many people now are requesting annual Social Security statements from the Social Security administration. Just go online and make the request, you'll get it every year.

I have a blank in 1988, and I can't correct it, because I didn't know what the rule was. Luckily, I've worked enough beyond that, that it's not going to affect my Social Security, but I suggest to all of you, you need to do that. That is another area where there's a statute of limitations, where you have a duty, really, to act to protect yourself.

Okay, let's move on. What's the ERISA recordkeeping recommendation here? There's a number of reasons that lead to these retention periods, but one is six years, you will see that six year statute of limitation, if you were not given notice. Let's say it was faulty notice, but let's say you didn't have notice. It would be good if you had the records at least six years, of how much you contributed into somebody's account.

The other place is the pension guarantee board has an absolute six year requirement, that you do need to follow. That's where we get six from, and it conforms to the longest statute of limitation. Reports to the federal government, your annual reporting on your pension plan, same six years. It shows you the way everything was supposed to be done.

The plan (this gets to the different form of retention) as it says in ERISA must be kept while the plan is active, plus six years. What does it mean for a pension plan to be active? It means that somebody is entitled to benefits under that plan. If all employees have either died off or exhausted all benefits, that plan could be terminated. Then the six years kicks in. the plan can go on for many years. An old plan could be in effect while a new plan is adopted. The new plan may not replace the old plan. You need to look at that.

There was one thing I forgot on the slide, and I apologize for that, and I noted it on the airplane, flying into San Diego. We also make one more general recommendation in this area, and that is that you keep summary information on employment--not detailed, summary--while the employee is active plus six years. That would be a basis four years of service, levels of salary, promotion dates, things like that, just the events that took place, not all the paperwork in detail and approvals and stuff like that. I refer to that as summary information. That becomes extremely important for some people, for the defined benefit plans.

I'm telling you it's unimportant for the defined contribution plans. Defined contribution plans with the ERISA statute of limitation, after six years, if an employee got the wrong amount contributed into their account under your 401(k) or other type of program, too bad for the employee. The employer has no duty, no interest in going back further than that, having records.

Yet, I find companies doing that all the time, and I beg them, "Don't do this." They keep saying, "Oh, what if we made a mistake? We don't want to disadvantage our employees." I said, "Well, then you do so and create this huge burden for your company out of the goodness of your heart." Tell that to your shareholders, since you're encouraging this expense out of the goodness of your heart. You're going to do the right thing, you're going to have good programs, your employees are given notice, employees have a duty to verify the information is correct. What else do you want?

I have this argument all the time with HR people. Then we get into the problem of the defined benefit plans, the old style. They say we have to recompute years of service and this. Well, if you have the summary records, you could do it real quickly. I say, and I find I have an awful difficult time convincing them of this, as of six years ago, you have documented years of service, salary levels, et cetera. Why do you have to go further back than that? Then another year goes by and you have a document that's six years old again, that documents years of service and predicts what the benefits will be in future years, et cetera. Why do you have to recompute it, when the employee terminates?

ERISA does say you have to have records to demonstrate that benefits have been paid correctly under your program. I have just suggested a recordkeeping plan that demonstrates that benefits are being calculated correctly, and therefore will be paid out correctly. But that's not the way the HR world wants to look at it. I give you this information to start challenging them. Again, I can't give you every citation in this type of presentation, but everything is supported by the legal research, by the appropriate citations. And if there's something that's missing that you need, please let me know, okay? By the way, in this case, is while the plan is still in effect.

I just want to take, then, the last part of today's session, very, very quickly, and then I'll open it up for questions, on the Uniform Electronic Transaction Act. I won't get to federal preemption. UETA was adopted in 1999, and adopted now in the United States by 47 states. Federal government has not adopted UETA, the Uniform Electronic Transaction Act. Instead, the United States federal government actually, before the Uniform law even came out for consideration by the states, adopted a law called “E-Sign”, Electronic Signatures and Global Networks. The US federal government adopted it in 1999. The governments of the world developed “E-Sign” to permit and promote electronic commerce between countries.

They wanted to say that if we do an electronic contract between the United States and France, it would be valid. But the United States' version of this says that if a state adopts UETA and UETA conflicts with “E-Sign”, this is the opposite of federal preemption. They say the state law will prevail. UETA will prevail, if it conflicts with “E-Sign”, even though UETA is a state provision, “E-Sign” is a federal provision. It basically says electronic records are valid, as valid as paper records, and very quickly, if you have electronic records and electronic signatures, they have the full effect of the law. It doesn't mean paper records are bad, it doesn't mean electronic records are better. They're just valid, if they're electronic. You can't discriminate against the record because it is electronic, as some courts in the past have tried to do.

The maintenance of electronic records constitutes legal compliance when you have a requirement to keep records. Please reconsider your thinking process when you read a law and the law requires you to keep a record. There are tens of thousands, if not hundreds of thousands in the United States, and Canada's doing a real good job coming up with their tens of thousands, that when the law says you shall keep records, there is no requirement that it be in paper.

Most of you start with the premise that paper comes first, and then the electronic comes second. Therefore, the paper is better. Paper is neither better nor worse. It just is, okay? I can give you many, many examples why the electronic records can be better, if for no other reason than we can fully back them up, at little or no cost, on a regular basis. In the paper world, it's very expensive to scan them all, microfilm them all, index, keep two sets of records. You don't want to do that.

Okay, and exchange of email may constitute a written contract without signatures. I keep warning organizations about this. I've sent you an email. "Will you paint my fence blue?" You respond, "Yes, I will paint it green for $25." I respond and say, "Okay." No signatures. We have written contracts. Email exchange has developed a new type of written contract in exchange of emails, and you need to recognize this.

Requirements to keep records are satisfied the retention of electronic records, retention of electronic images are electronic records. It's just as good as paper. By the way, there are numerous other laws we can look at, too, the Uniform Photographic Copies of Business Public Records as Evidence Act. For evidence purposes, the uniform rules of evidence, for the federal rules of evidence support reproductions, allow reproductions to be admitted to the same extent as the original.

We just went through four laws, with some of the background, et cetera. What I hope you take out of this is to be open to rereading some of these provisions. Don't just take somebody's word for it, that it means this in the recordkeeping area, because in most cases, the attorneys mean well, but they don't have your experience in records and information management. Therefore, they often make a decision that there's some risk here, so let's be ultra conservative. Your job is to point out, if we are ultra conservative, and we keep all our records forever, what is the risk of doing that? It's an important counter-argument.

We're just about at the end of today's session. Very important for you to fill out your questionnaires. Please give it to the gentleman over here, as you exit. And since our session is over, I won't keep everybody, but I'll be happy to stay and answer questions. Thank you all very much.

